

No. 2662

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

IN ADMIRALTY.

P. M. NELSON.

Appellant,

VS.

CARL PATSEL et al.

Appellees.

BRIEF FOR APPELLEES.

H. W. HUTTON,
Proctor for Appellees.

Filed this.....day of November, 1915.

FRANK D. MONCKTON, *Clerk.*

By.....*Deputy Clerk.*

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Statement of the Case.

Appellant has been engaged in catching and salting salmon on his own account since the year 1883. He owned the schooner C. A. Thayer. In 1913, he chartered the schooner Roy Somers, which vessel had always before been used in carrying lumber, for a voyage to Koggiung, Alaska, and return to San Francisco. At Alaska all of the men on board went on shore, lived and ate there, and, when the season was over, they loaded what fish had been caught and salted, on board of the vessel, and returned to San Francisco. At Alaska the C.

A. Thayer laid at a place called Neusig; ran short of provisions and those on her went over to the Roy Somers and took food from her which they did not take back again (page 95). At about the time the vessel was expected to leave, the cook made up a list of the things he was short of, without putting any quantities on it, and handed it to appellant, the master of the C. A. Thayer who seems to have had charge of the affairs of Nelson after he had left (page 169). He admits he did the ordering but did not check up to see what was on board either vessel. Captain Soland, master of the Roy Somers, testified (page 155) that he did not pay attention to the food. The result was that the vessel was short of most of the articles of food prescribed by Sec. 4512 Revised Statutes. The staple articles on the vessel on the way down being bread, salt, fish and beans, and even the beans gave out.

Testimony of Soland, master of the Roy Somers, page 155.

“Q. Your staple articles of food on the way down were bread, salt fish and beans, was it not?

A. That was the principal thing, yes.”

Nelson testified (page 138) that he did not know for sure whether he had ever had trouble before in regard to not feeding his men sufficiently. On page 139, he testified that two or three years before he paid either \$200.00 or \$250.00 to avoid a suit.

Upon the arrival of the vessel, 21 of her crew filed a libel in which they claimed, with respect to

the homeward voyage, that the water used for cooking was bad; that they had no salt pork for 12 days when it should have been served out to them; that no potatoes or yams were served at all; that no canned tomatoes were served; that no peas were served; that no beans were served for two days when they should have been served; that rice was served on but two days; that no fruit was served for 25 days; that neither onions or pickles or mustard was served out; that no dried fruit was served out; that no canned meat was served for Wednesdays or the last Sunday, and that no substitutes were given for any of the deficient articles (pages 6 and 7). The court allowed compensation for water, potatoes, rice, onions, beans and salt pork (page 199), a total of \$65.50 to each libellant.

Argument.

I.

The reply to appellant's brief, and our argument, will, for the purposes of brevity, be combined herein, and, taking up what first appears in appellant's brief, we respectfully submit that, if the testimony was to the effect that appellant hired Swanson to procure provisions, and Swanson failed to do so, that would not exonerate appellant. The duty of observing the law rested on appellant, not on his cook. The law is very clear as to what can excuse a failure to furnish the food prescribed by the statute. It is as follows:

Revised Stat., Sec. 4568:

“If it is shown to the satisfaction of the court that any provisions the allowance of which has been reduced, could not be procured in sufficient quantities, or were unavoidably injured or lost, or if by reason of its innate quality any article becomes unfit for use and that proper and equivalent substitutes were supplied in lieu thereof, the court shall take such circumstances into consideration and shall modify or reduce compensation,” etc.

Nothing but inability to obtain the article of food, or its destruction by its innate quality, satisfies the statute, and even then substitutes must be given.

Appellant does not attempt to claim that he could not obtain the food, but counsel claims the cook was to blame.

On page 141, transcript, Nelson testified:

“Q. The cook had nothing to do with putting the order in?

A. No.”

Further down on the same page he testified:

“A. I could not state the date, I always get my cook on board a few days before starting, so he can see that they have got everything that is down on the list.”

The list was unquestionably the list made up by Nelson himself, as the cook testified, on page 95, that he had nothing to do with the ordering of the stores here.

From the whole testimony it appears that Nelson made out a list, handed it into Dodge, Sweeney & Co. They filled the list and the cook checked it

up to see that everything on the list was delivered. He complained about shortage of potatoes, received some more sacks; but just what was done in the line of ordering in San Francisco has to do with this case, it is difficult to see, as some of what was received here was sent to the C. A. Thayer in Alaska, and not returned. In addition to the page hereinbefore mentioned Swanson testifies, on page 47, as follows:

“A. I say, ‘I have to get that and get that’. That other fellow, that other cook, come over to me and get sugar and one thing and another. Pete Nelson, he promised to, he said, ‘I get you that back in the fall when we come down’, but I did not get it again. He tells me ‘I get it back in the fall’, and did not get it back; and when I ask Pete Nelson for anything I could hardly get it.”

Nelson’s duty to obey the law could not be shifted to some one else by him, and the fact that some of the stores obtained here were sent to the C. A. Thayer makes what occurred in San Francisco, if he could shift his duty to the cook, inconsequential.

The testimony in this case was taken before the court, Swanson, the cook, testified that he told the master he did not have food enough to make the voyage (page 35). The master testified that the cook said he had enough for 35 days on (page 155). He testified that the cook did not talk to him about the food; that he saw it come on board but paid no attention to it (page 46). Swanson testified in a deposition that Nelson would not buy anything in Alaska.

There was no quarrel between the men and Nelson that the record shows. All that appears is that some of them wanted to bring some salmon bellies down, and conversations occurred between them and Nelson about it and he allowed them to do so. As to Patsel it appears he shipped on monthly wages, was put at other duty and asked for the pay of that duty, which he had a perfect right to do.

But every witness who testified, either for the libelants or for the respondent, agree, that some of the water was bad, and the food was short; so we fail to see what the trifling differences if any—we are unable to find any of consequence—has to do with this case.

All the witnesses testified that some of the water was bad, the master of the vessel testified (page 157):

“Q. How much bad water did you have aboard?

A. Well, I could not say; 5 or 600 gallons.”

The testimony is clear that the water was under control of a water tender (Swanson, pages 68, 69, 86, 186, 187; Nelson, witness for respondent, page 160).

Swanson had to use the water that was given to him. He so testified on the above pages that, it was the duty of the appellant to furnish good water, is clear.

Sub. 3, Sec. 4568, Rev. Stat., reads:

“3. In respect to bad quality, a sum not exceeding \$1 a day.”

The fact that they had but 75 gallons left when they arrived in San Francisco (page 148) shows it was necessary to use the bad water. There were 26 men on the vessel. The statutory allowance is 1 gallon per day per man. The vessel thus had 3 gallons short of three days' allowance when she arrived. The master told Swanson frequently to be careful of the water and it appears he had good reason to do so. The bad water appears to have been used all the way down except for two days and it was within the power of the lower court to have allowed \$27.00 to each of the men on this account. It allowed \$14.50 for 29 days. We submit the amount is not exorbitant and its justice is established by uncontradicted testimony.

POTATOES.

The court allowed \$1.00 per day for shortage of potatoes. None were given on the way down and no substitutes were given.

Nelson had been going to Alaska since 1883 and he must have known his potatoes would not last (Testimony of Davis, pages 127-129):

“Q. And it was to be expected, I presume, that they would deteriorate to some extent.

A. There is no question about that. They would not keep all of them the summer through.”

On page 129 he testified that some of the firms send potatoes to the fishing stations in Alaska every 6 or 8 weeks.

The potatoes in question began to get bad shortly after the vessel left. They had been sorted just before delivery and some of them were bad and Nelson must have known they would keep going bad.

The law as to his duty is very clear.

Rev. Statutes 4568:

“If it is shown to the satisfaction of the court that any provisions, the allowance of which have been reduced, could not be procured in sufficient quantities, or were unavoidably injured or lost, or if by reason of its innate qualities any article becomes unfit for use *and that proper and equivalent substitutes were supplied in lieu thereof* * * * the court shall take such circumstances into consideration and shall modify or refuse compensation as the justice of the case may require.” (Italics are ours through this brief.)

The law is, then, that if the article itself cannot be given, the substitute must. The substitute in this case is found in Sec. 4512, Rev. Stats., as follows:

“two ounces of dessicated vegetables for one pound of potatoes or yams.”

The substitute was not given. Appellant did not show why it was not given and, the proof, however, shows that no substitute could have been on board. In view of the well-known difficulties with potatoes on trips to Alaska, a prudent master would have had a stock as substitutes on board and served them out. For a failure to do so the statutory liability attaches.

RICE.

Rice should have been served on eight days and it was served two. The claim is made that oatmeal was given as a substitute.

Corn meal is also required by the statute to be served on Sundays and Thursdays. Oat meal or cracked wheat are substitutes for corn meal. Six ounces of hominy, oat meal, or cracked wheat, or two ounces of tapioca, are substitutes for rice. It does not appear that any corn meal was served.

Whether the oat meal was given as a substitute for the corn meal, or the rice, does not appear. It is very clear that if an article of food is not served out to the men, the burden rests upon the shipowner to show that a proper and equivalent substitute was given. If the oat meal was given as a substitute for the corn meal, it would not be a substitute for rice. If given as a substitute for rice it would not be a substitute for the corn meal, and the owner has failed in this instance to show that the statutory amount of the substitute, if it was given as a substitute for rice, was given. There is nothing to show that the men were given six ounces of oat meal in lieu of rice or four ounces of oat meal in lieu of corn meal.

The complete answer, part of which appears on page 12 of appellant's brief, is as follows (page 97) :

"A. That tapioca I used for tapioca was some we had; that tapioca Mr. Nelson gave to me I used that, but the captain of the 'Roy Somers' he had some old tapioca that was standing since the 'Roy Somers' was sailing on

the coast there, so he told me, 'You can see if you can't use that,' he said to me.

Q. Could you use it?

A. The captain eat some; it was standing there, but I could not use it.

Q. Why?

A. It looks very bad, black stuff."

Rolled oats were obtained from Mittendorf—90 sacks. The size of the sacks does not appear on the invoice and they must have been small as the total bill for 90 sacks is \$2.73—3 cents per sack.

We submit there was no error in allowing \$6.00 for rice. It will be remembered that it makes no difference if the provisions are on board the vessel, if they are not supplied to the men.

ONIONS.

Each of the men were entitled to 4 ounces of onions on each Sunday, Thursday and Saturday of the voyage, or thirteen days in all. Twenty-six men would have required 80 pounds of onions. The cook had 35 onions on board when the vessel left Alaska, and none were served out on the voyage. The court could have very well allowed \$13.00 for that item to each man. There is nothing in the record to show the onions would not or did not keep; on the contrary, there was one dozen on board when the vessel arrived here, which abundantly shows that the onions would keep. Appellant's brief under the head of onions reads:

"A large quantity of canned vegetables, such as corn, was supplied the vessel and actually used on the return voyage."

Mittendorf's invoice shows 1 case of corn, of the value of \$5.00 for 26 men—less than 20 cents worth for each man on a 29-day voyage, about $\frac{2}{3}$ of a cent per day for each man furnished, and that is the only vegetable that was furnished in Alaska, and what became of it does not appear. Whether it was all served in the captain's quarters, or none of it was served at all, does not appear.

Onions and potatoes are anti-scorbutics, both valuable articles of food, and very certain to make the other rather rough food provided on board a vessel to some extent palatable. Without either and on a continuous diet of salt salmon and beans, the food would undoubtedly become very unpalatable and even revolting, the human system requiring a variable diet.

BEANS.

The statute requires beans to be served on each Monday and Wednesday. They were not served for each of one of those days, and the court allowed \$2.00 for the shortage.

Beans are not a substitute for any article of food, and the fact that an overplus was given one week, to make up for shortage of other food, would not excuse a total shortage during another week.

We submit the allowance for beans was proper.

PORK.

Salt pork should have been served on each Monday, Wednesday and Friday—twelve days in all, or 312 pounds for the voyage. There was no salt pork at all on the vessel. They had some pigs going up, two were sold or given away, one was killed just after the vessel left coming down, and produced about 200 pounds. There is some uncertain testimony about weights and other pork being left over from a pig previously killed. We suppose that was all exhausted, however, as they would not have killed the last pig until it was exhausted. Two meals of fresh pork seem to have been given out, when fresh meat is given; one and one-half pounds per man is given in lieu of salt meat. That would have consumed 78 pounds, and left 122. The cooper appears to have salted that, and it was used to flavor beans with. Each of the appellees was entitled to salt pork served as salt pork—not sprinkled in beans, for ten days of the voyage when it was not served. That would have taken 260 pounds, and as there was not one-half that amount on board, that is no doubt the reason why no pork was given.

We submit the order as to pork was correct.

All the testimony as to the quantities of pork on hand when the vessel left Alaska, however, is purely speculative. Sec. 4571, Rev. Stats., requires the master to keep scales on board and weigh the

food, but there does not seem to have been any weighing on this vessel.

The only certain testimony as to what days the food was short is that of Charles A. Nelson (page 111). All the others admit shortage, but have no very clear idea as to the number of days of shortage. His testimony as to the shortage was as follows:

Salt pork for 26 days.

No potatoes or yams for 29 days.

No canned tomatoes for 29 days.

No canned peas for 29 days.

No beans for seven days.

Rice twice on the voyage.

No coffee for two days.

No molasses for 29 days.

No fruit of any kind for 25 days.

No pickles for 29 days.

No mustard for 29 days.

No onions except what was sprinkled in the hash for 29 days.

The testimony is clear that the cook refused to specify quantities, in the list he handed Nelson in Alaska (pages 47, 48). The cook simply made up a list and handed it to Nelson. The result was that there was \$167.40 worth of food bought in Alaska for the Roy Somers, an average of 19 cents worth per day per man, and apparently \$1084.10 dollars worth for the C. A. Thayer—\$5.41 of the \$172.81 bill being for tobacco, etc.

THE APPELLEES WERE SEAMEN.

The shipping articles commence.

“It is agreed between the master and seamen or mariners of the schooner Roy Somers, now bound from the port of San Francisco, Cal., to Koggiung, Alaska, and such other Alaskan ports as the master may direct and return to San Francisco for final discharge either direct or via one or more ports on the Pacific Coast, for a period not exceeding nine calendar months.”

Some of the appellees are given so much for the run, to wit, the voyage up and down, and some are on monthly wages. The vessel carried merchandise to be used in salting salmon up to Alaska, and, after fishing was all over, she carried the product, merchandise, back to San Francisco and that is all she did do, and it will not do to say she was not engaged in commerce.

The men in question worked as seamen going up, and worked as seamen coming down.

When Congress inserted the words “fishing vessels” in the Act of 1898, it meant fishing vessels as defined, or mentioned in Secs. 4391-4394, Rev. Stats. If the men in question had been under the provisions of those sections they would have had to agree as therein specified. The act reads, in part (Sec. 4391):

“for carrying on the Bank and other cod-fisheries, or the mackerel-fishing, bound from a port of the United States to be employed in any such fishery, at sea, * * * Such agreement

shall be indorsed or countersigned by the owner of *such fishing-vessel* or his agent. * * *

4392. If any fisherman, having engaged himself for a voyage or for the fishing season on any *fishing-vessel*'' * * *

In the case of *Telles v. Lynde*, the vessel was a codfishing vessel and all the fish were caught at sea and the men lived on her and was the same character of vessel mentioned in the above sections.

If this vessel had been chartered by Nelson to carry his supplies to Alaska and bring them back again, the contract being one of affreightment, she would not have been a fishing vessel. As it is she did exactly the same work, and the mere fact that it was a demise of a vessel, and not a contract of affreightment, cannot alter the character of the vessel.

The libel alleges (page 6):

“That on said voyage both to Koggiung and return the said vessel was used for the sole purpose of transporting libelants and supplies to said Koggiung, and bringing salted salmon from said Koggiung to said San Francisco, and never at any time engaged in fishing.”

The answer reads (page 14):

“Respondent admits that on such voyage to Koggiung and return the vessel was used for the sole purpose of transporting libelants and supplies to said Koggiung, and bringing salted salmon from said Koggiung to San Francisco, and denied that she never at any time engaged in fishing.”

The allegation in the libel being “at any time”, was broad enough to cover the life of the vessel; it was unintentional, however, and the denial was a safe one.

On the other hand supposing Nelson had been engaged in building a steam vessel in Alaska and carried the vessel in sections up there, including the men to build the steam vessel, and when she was built the men all went back on board and sailed the vessel back to San Francisco. It would be as reasonable to call the vessel a steam vessel under that state of facts, as a fishing vessel in this.

There were two contracts in this case; one to sail the vessel up and down, and the other to do work on shore. One part of the contract is subject to the provisions of the Revised Statutes, the other is not. But, independent of that, the scale of provisions is *in the shipping agreement that the appellees signed* and Nelson was bound under his contract to furnish that scale of food even if the statutory law did not apply.

The appellees were not fishermen nor was the vessel a fishing vessel when engaged in sailing to Alaska, nor were they fishermen when sailing her back again. She was being used both ways as a carrier and never was used in any other way.

The case of *Domenico v. Alaska Packers Ass’n*, 112 Fed. 554, related entirely to what had occurred on shore. The men struck while ashore, were allowed higher pay by

the superintendent, which was refused them; they signed off, and sued for the higher pay. The question involved was whether their release prohibited them from maintaining the action. If the seaman's part of the contract had been involved there is no doubt what the decision of his Honor, Judge DeHaven, would have been. However, the case was reversed by this Honorable Court; but even the decision of Judge DeHaven holds:

“The contract, while it provides that libelants shall render some services *as seamen*.”

It would be a singular construction of the law to hold that while working as seamen, the men in question while subject to all of the obligations of seamen, were not entitled to the benefit of laws made for their protection.

The only fish they caught from the vessel were codfish, caught in spare moments and used for food. They were on the codfish banks a few days and naturally caught fish, if they could, to eat. Counsel brought that testimony in to show that if they did not have one kind of food they had another. One man said he caught some for the table (page 123).

“Q. The codfish you caught yourself?

A. Yes, sir.

Q. Nelson was not engaged in catching codfish?

A. I caught it myself; I used it on the table you know.”

**SECTION 4612 OF THE REVISED STATUTES IS APPLICABLE
TO THIS CASE.**

The Act of August 19, 1890, as amended the last time in 1897, at first excluded articles sixth, seventh and eighth from shipping articles for the coastwise trade, when signed before a shipping commissioner. When the seventh was stricken out, and it left the sixth and eighth excluded.

The later and present Act, that of December 21st, 1898, 30 Stats. at Large 755, of course supersedes all previous Acts. Sec. 4612 is to be found on page 762 and, at the foot of the scale of provisions, we find the following language:

“The foregoing scale of provisions shall be inserted in every article of agreement, and shall not be reduced by any contract except as above, and a copy of the same shall be posted in a conspicuous place in the galley and in the forecastle of each vessel.”

Of course the law now is that when seamen sign shipping articles before a shipping commissioner he must see that the food scale is inserted in the articles as it is in this case.

**THE LOWER COURT HAD THE DISCRETION TO IMPOSE THE
MAXIMUM PENALTY.**

Sec. 4568, of the Rev. Stats., commences:

“If, during a voyage, the allowance of *any* of the provisions * * * the seaman shall receive, by way of compensation for *such reduction or bad quality*, according to the time of its continuance. * * *

That language is very clear; there is no escape from it, but counsel argues that the food must be taken as a whole, not by articles. In other words that, unless the master reduced the whole of the food by the specified quantities per day, no penalty would attach.

Let us see what that would lead to.

On Sunday sixteen articles are specified. On that day the master could withhold the first five, to wit: Biscuit, flour, canned meat, fresh bread, and potatoes, and leave the men canned tomatoes, coffee, tea, sugar, molasses, dried fruit, onions, lard and butter; not having reduced the whole by one-third, he would owe the seaman fifty cents.

On Monday, there are fourteen articles, specified. The master could withhold biscuit, salt beef, and fresh bread, and leave the men potatoes, beans, rice, coffee, tea, sugar, pickles lard and butter to live on, and owe the seaman fifty cents.

All the substantial articles of food could be withheld, the men get the minor article, and at the expiration of this voyage, the total sum owing would be \$14.50; of course that might be profitable to a shipowner but would certainly be very hard on the men.

No such construction can be given to the law, no such construction has ever been given to it, and it has been before this court, and the District Court in this District, and before several other U. S. courts.

The law is mandatory in terms, it can be easily obeyed; it is inexpensive, as the food is of the rougher and cheaper kinds. It was adopted for a wise purpose, and is entitled to a place among the wisest of the laws passed by Congress. As was said by his Honor Judge Morrow in the case of *Peterson v. Cunningham*, 77 Fed. 211 (page 219):

“The statute was enacted for the benefit of our mercantile seamen. It was designed to prevent famine on board vessels at sea, and to preserve the health of the crew.”

Billings v. Bausback, 200 Fed. 523.

THE APPELLEES ARE ENTITLED TO A LARGER DECREE.

This is a new trial. The whole case is before this court just as it was before the lower court. The testimony is uncontradicted that none of the following articles of food were served out on the voyage in addition to those allowed for by his Honor Judge Dooling, to wit:

The food scale calls for canned tomatoes on each Sunday and Friday. There were five Sundays and four Fridays during the trip. No canned tomatoes were served.

Peas are required on each Tuesday and Friday. There were four Tuesdays and four Fridays during the trip, and none were served.

No coffee for two days.

No pickles, required on Mondays, Wednesdays and Fridays, there being four of each during the voyage.

There was no mustard served out at all during the voyage.

No fruit for the whole voyage; that is required on each Sunday, Tuesday and Thursday. There were five Sundays, four Tuesdays, and four Thursdays during the voyage.

On page 71 however the cook testified that all the peas were used up in two meals.

On page 93 the cook testified that he gave the men prunes one day and fruit the next, but he is evidently referring to what happened prior to the time they left Alaska.

On page 25 he testifies as to canned meat. That it appears ran out on the way down; the men were entitled to canned meat on each Sunday and Wednesday, nine days in all, each one pound. The men would require 237 pounds. On page 25 the total amount on board when the vessel left Alaska was 114 pounds, less than one-half of what was required by the statute.

Salt salmon is not a substitute for meat, or for anything else. We respectfully submit that the appellees should be allowed for the additional articles not allowed for by the lower court, and the decree then affirmed.

Dated, San Francisco,

November 3, 1915.

Respectfully,

H. W. HUTTON,

Proctor for Appellees.

